

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Committee Comment - 1977

The rule is merely a specialized application of Rule 104. Rule 104 sets out the respective functions of the judge and jury. The judge is to make all determinations as to the competency or admissibility of the evidence and the jury is to determine the relevance or probative worth of the evidence. The "best evidence rule" is essentially a rule of competency. Secondary evidence is not competent to prove the contents of an original writing unless the original is destroyed, not available, etc. It is a matter for the judge to decide pursuant to Rules 1008 and 104(a) whether the condition precedent for admissibility has been established. Beyond the questions of admissibility certain factual disputes may arise. Three possible issues are listed in the rule:

- (1) whether the original ever existed;*
- (2) which of two evidentiary items is the original; and*
- (3) whether the secondary evidence correctly reflects the contents of the original.*

As to these questions the judge's function is to determine whether there is sufficient evidence in the record to support a finding on the issue. If sufficient evidence is in the record the issues must be submitted to the trier of fact for resolution.